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Locke Lord QuickStudy: FERC Updates Natural Gas Pipeline ?Certificate Policy Statement, GHG Policy?

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On February 17, 2022, the Federal Energy Regulatory Commission (FERC) announced two new policy statements intended to bolster the "legal durability" of the approval process for future natural gas projects. The policy statements were approved by 3-2 vote along party lines. Republican Commissioners Danly and Christie authored strong dissents to both policy statements.

First, the Certificate Policy Statement will be updated for the first time since 1999 to incorporate a broader range of impacts and information into the "certificate of public convenience and necessity" process under Section 7 of the Natural Gas Act (NGA), including non-economic impacts to landowners, environmental impacts of climate change, and environmental justice concerns. The Updated Certificate Policy will apply to new and pending applications immediately.

Second, FERC announced a draft Interim Policy Statement on Consideration of Greenhouse Gas Emissions (GHG Policy), detailing a new framework for greenhouse gas (GHG) and environmental impact analysis under the National Environmental Policy Act (NEPA). The GHG Policy will apply to pending and new applications under Section 3 and Section 7 of the NGA. Though the GHG Policy is subject to a 60-day public comment period, FERC has indicated that it will begin applying this policy to pending applications immediately.

These changes will impact the approval process for pending and future projects before FERC and will require a wholesale transformation of the way that FERC applications are prepared.

Background

Section 7 of the NGA requires natural gas facilities, such as interstate pipelines, to obtain a "certificate of public convenience and necessity" from FERC prior to construction. FERC's 1999 Certificate Policy Statement describes a multipronged approach to demonstration of the need for a proposed project. First, the project must be financially self-sufficient without subsidies from the project sponsor's existing customer base. After that threshold question, FERC performs a cost-benefit analysis, weighing the need for the pipeline against adverse impacts to existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, and the landowners and communities affected by the route of the new pipeline. NEPA then requires FERC to analyze the environmental impacts of project approvals.

FERC's certificate and environmental analyses were found deficient by the D.C. Circuit in *Vecinos Para el Bienestar de la Comunidad Costera, et al., v. FERC*, 6 F.4th 1321 (2021). In that case, the court found that FERC's conclusion that "it is not currently possible to determine localized or regional impacts from [greenhouse gas] emissions from the Project" was not sufficient to satisfy its obligations to consider environmental impacts under NEPA. Because the NEPA analysis was insufficient, the consideration of public interest factors was considered insufficient, and the court ordered FERC to reconsider its determinations under Sections 3 and 7 of the NGA. In *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021), the D.C. Circuit vacated the certificate issued by FERC to Spire STL Pipeline LLC finding that FERC's determination regarding the market need for the proposed pipeline was arbitrary and capricious, and was not supported by the Commission's Certificate Policy Statement.

Actions

Updated Certificate Policy Statement

In issuing the Updated Certificate Policy Statement, FERC recognized that "although precedent agreements remain important evidence of need, precedent agreements alone often may not be sufficient to establish need for a project." FERC identified four major adverse impacts that FERC will consider for future proposed projects:

- Interests of the applicant's existing customers;
- Interests of existing pipelines and their captive customers;
- Environmental interests; and
- Interests of landowners and surrounding communities, including environmental justice communities.

In considering these factors, FERC has indicated that information regarding the necessity of the new project, such as the end use of the gas, demand projections, estimated capacity utilization rates, potential cost savings to customers, regional assessments, and statements from state regulators of local utilities will be helpful in preparing its analysis.

Impacts on current pipeline customers of both the proposed project sponsor and its competitors will still be considered in the "public convenience and necessity" inquiry, but the Updated Certificate Policy Statement indicates that FERC is more likely to consider a more nuanced demonstration of need, beyond the customer contracts upon which it has primarily relied. The ability of a pipeline project to be financially self-sustaining will still be considered, but FERC will no longer consider this a "threshold" question. Additionally, the potential for creating excess capacity that would need to be sustained by captive customers will continue to be assessed.

FERC intends to engage in a more robust analysis of landowner impacts, considering more than economic effects. The Updated Certificate Policy states that FERC will consider the particular needs of environmental justice communities when deciding whether to approve a project, and if approved, what mitigation measures may be necessary. Additionally, the GHG Policy is intended to bolster FERC's analysis of the "environmental interest" inquiry for the certificate approval process by providing a framework for analyzing climate change impacts associated with a proposed project.

GHG Policy

The GHG Policy will provide a guideline for quantifying a proposed project's GHG emissions and set a GHG emission threshold to prompt the preparation of an EIS. The GHG inquiry will be limited to those emissions that are "reasonably foreseeable" and "have a close causal relationship" with the proposed project. In quantifying these emissions, FERC proposes to limit the lifecycle analysis to the direct emissions from a proposed project by generally excluding upstream and downstream emissions. These "direct emissions" are emissions that result from short-term construction, long-term operation, and fugitive emissions associated with the project. Reasonably foreseeable upstream and downstream emissions increases, however, may be considered on a case-by-case basis.

The GHG Policy will establish an "automatic" trigger for NEPA EIS preparation, subject to rebuttal. In its staff presentation, FERC indicated that it will determine whether to prepare an EIS using a rebuttable presumption that projects with estimated greenhouse gas emissions of 100,000 metric tons per year or more of carbon dioxide equivalent (CO_2e) will have a "significant impact on the environment." It is important to note that for purposes of assessing the appropriate level of NEPA review, FERC will consider the maximum potential amount of GHG emission by determining the 100% utilization rate or "full burn" for the proposed project's emissions, rather than an estimate of actual pipeline use.

FERC will also consider proposals to mitigate all or part of the potential climate change impacts of a project in its analysis. No "standard" mitigation measures will be specified and the inquiry will be conducted on a case-by-case basis. Mitigation proposals should be carefully considered, as approval of a project may be conditioned upon mitigation performance.

The GHG Policy also outlines the type of information sought to analyze the GHG emissions of proposed projects, including:

- Information about the project's utilization rate, including: expected utilization data from project shippers; historical usage data for expansion projects; demand projections; and an estimate of how much capacity will be used on an interruptible basis;
- Estimates of GHG emissions provided by both project sponsors and project opponents;
- Offsets;
- The reasonable foreseeability of upstream or downstream GHG emissions impacts; and
- Proposed mitigation.

The Future of FERC Applications for Natural Gas Projects

In anticipation of the issuance of the new policy statements, Locke Lord has been guiding its clients in transforming the way that natural gas project applications are prepared.

Early Stakeholder Engagement

Project sponsors must engage early and often with stakeholders, including environmental justice communities. Consultation and meaningful on-the-ground engagement with local communities prior to finalizing the project scope, route, and design will provide a more effective forum for stakeholder involvement. Holding additional open houses and community gathering opportunities will provide project sponsors with a means to addressing stakeholder concerns prior to application submission and during FERC's review.

NEPA Analysis

By creating an EIS trigger threshold, FERC has clearly delineated which projects will be subject to full EIS review. The majority of projects are expected to exceed this threshold, as “projects that likely have 100,000 metric tons per year or more of GHG emissions include projects transporting an average of 5,200 dekatherms per day and projects involving the ?operation of one or more compressor stations or LNG facilities.?” The introduction of a GHG threshold to trigger EIS analysis will provide some measure of certainty regarding the elements of NEPA analysis for pipelines with expected emissions of 100,000 CO_2e and above.

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